THE MODERN DEMOCRACY

THE CITIZEN

AND

THE LAW

BY

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JUSTICE, SUPREME COURT OF WISCONSIN

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Modern American Law

A Systematic and Comprehensive Commentary on the Fundamental Principles of American Law and Procedure, Accompanied by Leading Illustrative Cases and Legal Forms, with a Revised Edition of Blackstone's Commentaries

PREPARED BY

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Modern American Law

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GENERAL INTRODUCTION.

Modern American Law is a general, systematic and comprehensive commentary on the fundamental principles of American law and practice.

The commentaries of Sir William Blackstone on the laws of England and of Chancellor James Kent on American law demonstrate the feasibility and value of presenting, within comparatively narrow limits, the principles of the law. The works of legal writers of a previous century, however, do not adequately expound the law of the present day. The rapid increase of legislation, the enactment of constitutional amendments, and the necessity of applying the principles of law to new problems clearly indicate the need of a modern commentary.

Modern American Law is the work of judges, teachers in law schools and writers on legal subjects. That the work is the combined effort of many minds and not of one, is a source of unusual strength and advantage. The authors present not only the modern rules of law, but, as well, the origin, nature and growth of the law.

The entire field of law is systematically covered. The foundational or the basic subjects are treated first, and, following them in related groups, are the

derivative subjects. The work thus provides a logical and systematic course of reading in law.

Each volume contains: first, treatises dealing with the several branches of the law; second, leading illustrative cases taken from the federal, state and English reports, elaborating and explaining the treatises; third, quiz questions and problems, based upon the treatises; fourth, bibliographies; and fifth, a comprehensive index of the volume. In the fourteenth volume are included standard legal forms. The fifteenth volume is devoted to a modern edition of Blackstone's Commentaries and a table of all cases cited throughout the volumes together with a cumulative index. It is possible by means of the index and the table of cases to find the discussion of any particular principles as applied to all branches of the law.

Modern American Law is offered to the rêader with the confident belief that it will prove to be a standard legal commentary, useful alike as a work of general reading and of reference.

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THE MODERN DEMOCRACY, THE CITIZEN AND THE LAW

BY

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If we take account of time by the majestic march of the centuries rather than by the feverish flight of the seasons, and measure progress by great world movements, rather than by the petty events of this or that community, we shall find that it is no very long time since the law was generally regarded as a mysterious, if not an occult, science, entirely beyond the grasp of the ordinary citizen.

Its decrees were accepted and obeyed not because they were based upon reason, but because they emanated from a power capable of enforcing them. When told that some grievous and palpably unjust result must be endured because the law said so, the citizen was, perforce, content, or at least resigned to his fate, wondering, perhaps, why it must be so,—but hardly venturing to think that law could ever be made logical and just, as well as inexorable.

In the days of absolutism this attitude of the citi-

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zen towards the law was natural and almost inevitable. The liege-subjects of a feudal sovereign had a valid excuse for not familiarizing themselves with the fundamental law of the state; they did not make the law and could not change it, however wrong it might be. The citizens of a democracy, however, have no such excuse; they are the lawmakers, and it is their duty no less than their privilege to change the law if it be wrong.

The future historian will find many things of surpassing interest when he comes to review the opening decades of the twentieth century, but he will find nothing more interesting or significant than the great wave of democracy which is now sweeping over the earth. It is not that this will be the only great and significant movement of the present day which he will find it necessary to review, for there will be many others. Among these will be the wonderful increase of education among the masses of the people. Brougham said nearly a century ago that the schoolmaster was abroad; but, where there was one schoolmaster abroad at that time there are a hundred now. He is not always educating wisely, perhaps; his courses may be superficial and fragmentary, and his abilities meagre, but whatever be the faults or deficiencies of his system, he is imparting to his pupils something in the way of knowledge, either utilitarian or abstract, and for the first time in the history of the world the great mass of the people are receiving some sort of education. It can hardly be doubted that before the lapse of many years practically every citizen of the so-called civilized nations, whether male or

female, black or white, will not only be able to read and write, but will have such general knowledge on subjects connected with his occupation or the general welfare, or both, that he will be able to discuss and take a more or less intelligent part in the social and political movements of the time.

Again, the future historian will be compelled to note the great industrial revolution now approaching its culmination, the astounding growth of the city at the expense of the country, the change from the individual to the community life, the vast increase in creature comforts, and the evolution of the means of communication and travel on a scale never before dreamed of. All these he will see, and more, and yet the great fact which will overshadow them all will be the fact that at this time the people of every nation first began to realize the fact that democracy may well mean something more than the right of certain classes of citizens to vote at stated intervals for representatives who may or who may not carry out the will of those who elect them. This remarkable world movement must be apparent to the most superficial present day observer of the signs of the times. Let any such observer take the world's map and put his finger where he will, he will find some phase of it. In Great Britain it takes the form of nullifying the powers of the House of Lords and curbing privilege of birth; in France and Germany it appears in the garb of socialism; in China a republic supplants the rule of the Manchu dynasty, and in other countries it appears in various movements all directed with greater or less wisdom to the wiping out of one form

or another of privilege. Everywhere there is political unrest; everywhere there is clamor for more direct and complete control of the government by the people. In our own country the democratic drift is, perhaps, more marked than anywhere else. We have long thought that we, in fact, had a democracy, or, perhaps more exactly, a group of democracies united for self-protection and mutual benefit here on this side of the Atlantic. As a matter of fact there is much in our state and national governments that is not strictly democratic. But, unless every sign fails, we shall have democracies here before many years such as the world has never seen on any such scale before; at least we shall experiment with them.

The democracies which we have had are representative democracies founded on the principle of preserving to the greatest possible extent the rights of the individual. The democracies which are coming, unless all signs fail, are democracies of direct popular action in which individual rights and privileges must give way in very many and very important particulars to regulations and restrictions deemed necessary for the benefit of the great mass of the people.

The democracies of the present enact their laws by representative bodies chosen from the electorate, and delegate many governmental powers to officials or bodies of officials removed by many steps from the direct control of the people. The democracies which are coming propose to place both legislative and executive power directly in the hands of the people, or under their immediate control, so far as that may be possible. The democracies of the past have limited

the electorate to male citizens, the democracies which are coming will, without doubt, welcome to the electorate female citizens on equal terms, not as privilege, but as right.

The direct primary, the initiative and referendum, the recall, the equal suffrage movement, the election of United States senators by popular vote, the presidential preference primary,—all these movements, whether yet crystallized into law or only agitated, are simply manifestations of the overwhelming democratic spirit of the time. Some of them may prove to be mere experiments which will be abandoned after trial, but some either *have* come or *will* come to stay, and, unless all signs fail, other changes which will tend to bring the administration of governmental affairs more quickly and completely within the control of the electorate will, at no distant day, be added to them, and ultimately be incorporated in our state and national governments.

The wisdom of the innovations which are coming, or are already here, is not germane to the purpose of this article. It is sufficient to say here that there seems no doubt that they are coming, that they will be tried out, that some of them will be permanent, that they will work important changes in our social, as well as our governmental life; changes which every citizen ought to seriously consider.

The most serious thought which must present itself to the mind when these great movements for more direct and speedy control of governmental affairs are considered, is the thought of the vastly increased responsibility of the citizen. A benevolent despotism

may, perhaps, rule wisely and well, although its subjects are generally ignorant and have no high ideals, but it is very certain that the only foundation upon which a democracy can safely rest is the intelligence and virtue of the people. If this be true of a representative democracy, where legislative and other governmental activities are carried on by representatives with only an occasional appeal to the people, how much more true must it be where the people themselves, by initiative, referendum, recall, or other kindred means, keep their own hands directly upon governmental processes.

If the people are to rule in person and not by representatives, a proposition which, as applied to a great and populous state, is difficult, but perhaps not impossible, the people must be fit to rule; to be fit to rule they must not only be educated, but the great mass of them must be of good, moral character.

A pure democracy cannot exist if its electorate be either ignorant or corrupt. If the fountain head be poisoned, the waters of the stream cannot be sweet.

The question whether the American electorate is in all respects fit to assume the duties and responsibilities which must result from the new democracy which is at our doors is by no means free from doubt. We are much accustomed to boast of the intelligence and good morals of our people, but boasting proves nothing.

Taking up the question whether the moral tone of the people is improving as the need for higher ideals increases, we shall find conditions not altogether reassuring. In the first place, we find that the indus-

trial revolution has brought us not only the vast factory and largely supplanted human labor with machine labor, but has added very serious difficulties to the problem of maintaining, not to say elevating, the moral standards of the people.

The great city has come, and come to stay, and it has brought its great problems with it,—problems which will call loudly and more loudly for solution as the years go by. They are the problems of the slum, the tenement house, the social evil, of child labor, of congested population and unsanitary living, of alluring vice in all its phases, and many others, all of which have greater or less bearing upon the physical and moral manhood and womanhood of the race. The sturdy farmer, who is daily breathing in health and strength under the open sky, surrounded by the inspiration of Nature's wonders, is giving way to the city dweller, the operative in the great shop, and the thousand and one stunted and narrow-chested workers in the city streets, who just manage to keep body and soul together, and go to bed at night hopeless and wearied, or try to drive away all thought of the morrow by forced and shameful merriment. The picture is not overdrawn, and it is not encouraging to one who is looking for improvement in the moral tone of the people at large.

This is not to say that the moral fibre of the nation is weakening. Churches, schools and philanthropic societies of various kinds are working as never before, but there is need of such work as never before. The political condition of most, if not all, of our great cities is distressing already under a representative

democracy; what will it be if we are to have direct democracies and immediate control by the electorate? What will it be when the cleavage between great wealth and abject poverty becomes more pronounced? What will it be if class hatred grows more acute? What will it be if the urban nurseries of crime go unchecked and the professed criminal classes increase in the future as they have in the past? Who can answer? It is not pleasant to speak of these things,—indeed they are not much spoken of in our best society. People go to their receptions, their teas and their banquets, and talk of the weather, of the last opera, or the latest book. It is far more comfortable to ignore such disagreeable questions as those suggested. Yet the time has certainly come when they must be considered, and the wonder is that anyone could think of ignoring them.

So far only the problems which are peculiar to the great city have been spoken of, but there are others which are present not only in the city but in the village and in the country as well, and they also threaten to affect the moral tone of our citizenship.

The great increase of wealth and luxury which has come from the development of our wonderful natural resources has resulted in a perceptible lowering of ideals. Our forefathers struggled for very existence in the face of tremendous difficulties; they subdued forests, endured the privations of the frontiers, and in the midst of toil and privation laid the foundations of the state that was to be. Amid such labors and privations it was natural that they should develop the sterner elements of character, the elements of forti-

tude, both physical and mental, of self-control, steadfastness and probity of purpose. We who have entered into their labors and are reaping the results of their self-denial, either by way of making gain from vast business enterprises or dwelling in an atmosphere of ease or luxury which they made possible, are quite apt to have our thoughts directed to the material things,—the things which make life pleasant and enjoyable, to the neglect of the sterner virtues.

It is not possible for one citizen, or for any group of citizens, to make any appreciable change in the material conditions of the age in which we live. We cannot go back to the days of our fathers if we would. "The moving finger writes, and having writ, moves on,"—not backward. The great city will become greater, the opportunities for the acquisition of wealth will not decrease but rather increase, the use of the conveniences and luxuries which modern life places within our reach will not cease, the temptation to live a life of ease and pleasure, regardless of the cry of the unfortunate and afflicted, will be just as strong. How are all these weakening tendencies to be met and overcome? How are we to make sure of that high grade of morality in our citizenship which will be necessary in such democracies as we shall have?

This question is probably not capable of an authoritative answer in a single word, nor will the attempt be made to give one, but the word which comes nearest to it is the word "Service."

For centuries individualism has been the keynote of civilization, especially in this land which has

boasted so loudly of its freedom and equality. We have gloried in the idea that every man was the master of his own destiny and must fight his battle alone; we have seen the struggle for wealth and social distinction,—nay, even for the necessities of life become fiercer and fiercer, and we have condoned the ruthless cruelty and selfishness of it all on the ground that all citizens have equal opportunities and that the triumph of the strong and the trampling down of the weak is but the working of Nature's immutable and righteous law.

But the consciousness that man cannot live for himself alone has come at least; the public conscience is awake; we now, for the first time, realize faintly and imperfectly the marvelous significance of the parable of the good Samaritan. We are learning who are our neighbors and we are realizing that an injury to "one of the least of these" is an injury to society as a whole.

Thousands of men and women with the spirit of the good Samaritan in their hearts are hearing the call,—men and women who could, if they chose, be clothed in purple and fine linen, and fare sumptuously every day. But they have chosen the better part. Comparatively speaking their work has but just begun, and yet there are results to show. The slum is yielding to the settlement. The haunts of vice in the great cities are still practically untouched, but there is handwriting on the wall, and the waves of an awakened public sentiment are rising with ominous strength. Everywhere earnest men and women are banding together and devising ways and means,

either by way of legislation or agitation, or both, by which moral standards shall be raised, the frightful injustice of modern life in the great cities shall be corrected, disease vanquished, vice made hateful and life made to hold forth its promise of hope and joy to the most unfortunate.

The layman is springing to the aid of the priest and the preacher, not always using methods which the priest and the preacher approve, and not always relying on orthodox theology, but still rendering great and undoubted service to the cause of good morals and good citizenship. He will not supplant the church, but he will be its efficient aid. He will not use so much the methods of prayer and praise; these he will leave largely to the church, but he will use agitation and legislation: he will build, if it be possible to build, a system of law which shall assure justice to all, which shall, as far as may be, equalize opportunity, rid the city of the slum, protect childhood, stop the propagation of defectives and criminals, and gradually eliminate poverty, disease, and crime.

The vastness of this programme is only exceeded by the desirability of its realization. It has been said that these American commonwealths are too much given to legislation already, and the countless volumes of useless statutes now burdening the shelves of our law libraries are pointed to with derision as proof of the fact.

There is too much of truth in the gibe to allow of its being turned aside without notice. We have had and are still having too much hasty and ill-digested legislation. It is natural that it should be so. New

states, filled with young and enterprising people, facing new questions and charged with the duty of developing untold natural resources, will necessarily adopt new and untried means of meeting difficulties. There are few conservatives in such communities; youth and inexperience know not fear and dread not novelty. Every man in a new community is apt to deem himself a fully equipped legislator, ready and able to take up the greatest questions of statecraft and settle them satisfactorily in a three months' legislative session. In view of all the circumstances, the wonder is not that there has been so much useless legislation, but that there has been so little. The results prove not by any means that legislation is futile, but rather that it must be more scientific if the best results are to be reached. We are willing to admit that we ought to have experts for other governmental functions which require special qualifications, but we seem very slow to learn that law-making is the most difficult science of all, because it requires not only the wisdom of the philosopher and student of history, but the foreknowledge of the seer. He who would make a new law in a yet untrodden field of legislation must have the ability to read the future as well as the past; he must have prescience as well as experience. But we ought to be fair to the legislatures of the past, even though we feel obliged to be critical. Notwithstanding their blunders and the mass of hasty, crude, and ofttimes absurd legislation which they have piled upon our shelves, it would be untrue to say that they have accomplished no valuable results. Decry their ill-considered efforts as we may, we must admit that

there are two sides to the picture, after all. They have not been experts, but they have done much valuable work, notwithstanding their inexpertness. Consider for a moment the matter of compensation for injuries received by workingmen in the course of their employment, and the compensation of their families in case of death resulting from such injuries.

Prior to the development of the railroad, the mammoth shop, and the infinite mechanical dangers to which the modern workman is momentarily subject, the common law had laid down a few simple principles regulating the liability of the master in case of his negligent default resulting in injury to the servant, and denying any liability in case the injury was caused by the negligence of a fellow servant, or in case contributory negligence or assumption of risk existed on the part of the employee.

These principles were not seriously faulty, perhaps, when applied to the conditions of the time. Those were days when the workman knew his fellow servant, worked with hand tools or simple machinery, and ran comparatively small risk of injury. The personal injury action was one of the rarest actions upon the calendars of the courts. Gradually, very gradually, the great industrial revolution came upon us. The little body of workmen, all knowing each other and working within sight of each other with simple tools, by slow and almost imperceptible degrees became the army of employees working, perhaps, at great distances from each other, and known by number rather than by name; the small shop grew to be the enormous plant, covering acres; the simple machinery,

under easy control, became a mighty and complicated system of vast machines, driven by a power rivaling that of the thunderbolt itself; and the lumbering stage coach gave way to the palatial railway train. During the same time, and by equally slow and imperceptible degrees, the occasional simple accident was replaced by daily and almost hourly accidents, amounting frequently to tragedies, and the victims of industrial accidents became a veritable army, marching with halting steps and dimming eyes to the great hereafter. Slowly and imperceptibly also personal injury actions increased in number until they began to clog the calendars of the trial courts. It was not the proper function of the courts to change well established principles of law, and so the doctrines of fellow servant, contributory negligence, assumption of risk, and ordinary care continued to be applied as they were applied in the earlier and simpler days. The result was a really deplorable condition of things. The injured man or bereaved widow was generally poor and unable to employ an attorney in the ordinary way, and hence was generally obliged to pay the attorney by giving him a share (and sometimes a very large share) of the recovery, if a recovery was had. This system wrought harm in more ways than one: It distinctly lowered the tone of the bar by creating a class of attorneys who sought such business and became really fomenters of such litigation; the lawyer became a joint adventurer with the client, and his keen interest in the result dulled his conscience and tempted him to overlook perjury, if not to actively encourage it. On the other hand, juries well knew that the recovery

would have to be divided with the lawyer, and thus often rendered excessive verdicts in order that the injured party might have adequate compensation after the lawyer's share had been taken. Thus the economic waste became enormous. The employer, after contesting the case through all the courts, paid an exorbitant sum if defeated, of which the injured person received only a fraction, but he also paid a considerable sum to his own lawyer, even if successful, of which, of course, the injured person received nothing. One could hardly imagine a greater economic waste than this. A system which spends many dollars in the effort to ascertain whether one dollar should be paid by one citizen to another can scarcely be considered a desirable system. But a still more unfortunate result of the situation was the bad feeling which it encouraged between employee and employer, and the distrust with which the employee, defeated perhaps by one of the common-law defenses before mentioned, began to regard the courts. The employer was charged with heartlessness and greed, the courts with dishonesty and corruption, and the litigant frequently met the supposed combination between capital, on the one hand, and courts which rigidly enforced the technical rules of archaic law, on the other, with flat perjury. Class hatred, distrust of the courts and the law, wholesale perjury, and enormous economic waste—these were the inevitable and lamentable results of the legal proceeding known as the personal injury action. Here the common law was surely breaking down.

Nothing short of legislation novel in its character

could meet these grave questions, and that legislation has finally come in many of our states, and will unquestionably follow in all. In most of the states where this legislation has been attempted, two definite results have been aimed at: first, to reduce to the minimum the number of injuries by rigid inspection of all manufacturing establishments, by the enforced introduction of every practicable safeguard against accident or disease; and, second, to provide in some form for the automatic adjustment of claims for all industrial accidents on a fair and equitable basis, so that every injured employee (not wilfully negligent) should be assured of a reasonable indemnity, without delay and without expense, the method of payment being so arranged that the consuming public should ultimately bear the burden.

The first of these aims was relatively easy of accomplishment, but the second has been fraught with much difficulty by reason of the restraints imposed upon legislation by the terms of our written constitutions. While it would not be accurate to say that the problems have been fully solved, it may be said with confidence that the legislation already secured has been substantially successful and that the results make certain ultimate extinction of the personal injury action between employer and employee, and a great reduction in the number of industrial accidents.

These things have been accomplished by legislators who are not experts, who have been forced to act with little help from scientific investigation or research, and who have left their regular occupations for a few weeks to struggle with and attempt to satisfactorily

solve some of the gravest questions which have ever confronted the human family.

In other fields, where modern civilization has produced evil conditions with which the common law has been unable to successfully cope, legislation has made fairly satisfactory efforts to meet the new problems. Witness the sanitary inspection laws, the tenement house laws, the laws preventing the employment of children in life-destroying occupations, the laws regulating the service given to the public by public utility corporations, and many other laws which can not here be mentioned.

Who shall say, in the face of these achievements, imperfect though they may be, that legislation is futile, or that the legislators of the past have done little but cumber the statute books with useless laws? Rather we should say that in scientific and well considered legislation lies the great hope of the future. The ever-increasing problems arising from our complex community life will have to be met unless we are ready to admit our incapacity and are content to follow the civilizations of the past into well merited decadence and oblivion.

And so it seems as certain as any future event can be that we are entering on a period of great legislative activity, when remedies will be proposed for all our ills, both real and fancied. It may be at once admitted that legislation can not remedy every wrong, nor make the nation virtuous and moral; but still it is undoubtedly true that legislation can exert a profound influence on the morals of a people by eliminating as far as possible the material conditions which

make for misery and crime and by creating and fostering those conditions which make for happiness and right living.

Vice will find little room for growth in a community where prevail living wages, healthful homes, equal opportunities, innocent amusements for young and old, and social justice; where the slum, the bawdy house, and the indecent show do not exist.

Now, if these conditions are to be brought about or hastened by legislation, and if the people themselves by means of the initiative and referendum are to take a controlling or even an important part in such legislation, the necessity of a highly intelligent as well as a moral electorate is very evident.

Not only shall we require the services of the skilled investigator and philosopher in the preparation of the new laws; not only shall we require the legislative expert in our national and state legislatures; but, above all, we shall require an educated electorate—an electorate capable of appreciating the nature of the problems presented, and sufficiently acquainted with present conditions, both material and legal, to be able to judge of the wisdom of the proposed legislation, and vote intelligently thereon.

This does not mean that all citizens must become lawyers, but it does mean that the study of the law should no longer be left to the lawyers alone; it does mean that the law should cease to be regarded as a sort of black art, whose unaccountable results only the initiated can understand, but as a true science of which every educated person should have at least a general knowledge.

It is as impracticable for all of us to be thoroughly educated lawyers as it is for all of us to be thoroughly educated engineers, physicians, or political economists; yet it is very certain that educated men and women are rapidly coming to be sufficiently familiar with the basic principles of engineering, health, and political economy so that they are able to comprehend the expert discussion of questions in either science, and pass intelligent judgment thereon.

It would not be correct to say that they are experts themselves, but rather that they are becoming highly intelligent jurors, fitted to take intelligent cognizance of questions discussed by the experts.

This result has been reached rather by the general dissemination of books and periodicals treating of such subjects in familiar language than by systematic study in any institution of learning.

There has doubtless been much less of this sort of education in the law than in either of the other sciences mentioned. It is true that there are some legal periodicals which have a field larger than the legal profession, and there are some recently established magazines which are making an earnest appeal to educated men and women of all classes, with a view of bringing together all such people in the intelligent study and appreciation of legal problems. The modern legal text-book, however, is not an inviting object to the most intelligent layman. In most of them, philosophic discussion of legal principles has ceased, and they have become simply more or less perfect guides to that "myriad of precedent, that wilderness of single instances" known as the reports.

They are most valuable to the practicing lawyer, but are hardly more inviting to the layman than a dinner of husks set before a hungry man.

It is confidently believed that there is a well defined place for a work which shall cover the field of existing law comprehensively, concisely, and accurately, and which shall not consist of lifeless rules fortified by multitudinous citations, but which shall be a readable and accurate commentary upon the existing law, couched in language which may be easily understood by layman as well as lawyer—a work which will be a welcome addition to every private library, and which may be consulted with pleasure as well as profit by every intelligent citizen who desires to know the condition of the law upon any subject.

It is thought that the present work fulfills this idea; it is hoped that it will take its place as a luminous and complete commentary upon the existing law; it is hoped also that it will assist in solving the great problems of government under the direct control of the electorate, by materially hastening the day when the layman as well as the lawyer will not only have knowledge of the general principles of the law, but understand the reasons behind the principles as well, and thus be able to vote intelligently when the question of a substantial change in the existing law is submitted to the electorate, and discharge understandingly the many onerous and exacting duties which will inevitably fall upon the citizen of the Democracy of the future.